89-378

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1989

STATE OF ALABAMA, ex rel. DON SIEGELMAN, ATTORNEY GENERAL, AND DON SIEGELMAN, INDIVIDUALLY, AS A CITIZEN OF THE STATE OF ALABAMA
PETITIONERS,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND LEE M. THOMAS, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND CHEMICAL WASTE MANAGEMENT, INC., AND STATE OF TEXAS,
RESPONDENTS.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

STATE OF ALABAMA	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	
	)	
THE UNITED STATES ENVIRONMENTAL agency; ET AL,	)	CIVIL ACTION NO. 88V-987-N
	)	
Defendants,	)	
	)	
CHEMICAL WASTE MANAGEMENT, INC.; ET AL,	)	
	)	
Intervenors	)	

MEMORANDUM OPINION
AND ORDER

This cause is submitted on the Plaintiffs' motion for an order temporarily restraining Defendants and those working with them transporting or permitting to be transported within the State of Alabama hazardous waste originating from the Geneva Site in Texas pursuant to contract between Chemical Waste Management, Inc.

[Chem-Waste], owner of a hazardous waste dump site in Emelle, Alabama, and the State of Texas.[1] Plaintiffs take the position that the officials of Defendant, The Environmental Protection Agency [EPA], failed to follow the EPA's own regulations and the law pertaining to disposition and removal of said hazardous waste from Texas to Alabama pursuant to the provisions of law set out in 42 U.S.C. §§9601, et seq. In its simplest form, the EPA has agreed to have 47,000 tons of contaminated soil removed from Geneva, Texas, to Emelle, Alabama, without

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[1]Apparently, the contract was formally entered into by Chem-Waste with the Texas Water Commission [TWC], agency for the State of Texas.

notice to or opportunity for conciliation or hearing to the State of Alabama or its citizens. In the opinion of this Court, it is unnecessary that this Court at this time consider other allegations of improprieties in the act of the EPA for the reasons set out hereinafter.

This Court has allowed the State of Texas on behalf of the Texas Water Commission [TWC] and Chem-Waste to intervene in this suit, but because of information from the attorneys for the EPA that transportation of the hazardous waste is to begin on this date, this Court will consider the propriety of entering a temporary restraining order at this time against the Defendants.

This Court is of the opinion that, independent of constitutional requirements, Congress saw the basic need, and created a statutory scheme, for disposal of hazardous waste materials after a full opportunity for all affected persons, including States to present their problems and to have their burdens fully considered by experts in the field of hazardous waste. 42 U.S.C. §§9601, et seq. In §9601(21), the term "person" is defined to include the United States Government, a State or any political subdivision thereof. 42 U.S.C. §9601(29) adopts the definition set out in 42 U.S.C. §6903(5) for the term "hazardous waste", meaning "a solid waste or combination of solid wastes which *** may (A) cause, or

significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly stored, transported, or disposed of, or otherwise managed."

The parties seem to agree that the EPA commenced considering the propriety of removing this waste from Texas prior to September, 1986, and on September 18, 1986, the EPA issued a Record of Decision [ROD] for the Geneva Site which provided for removal of 36,000 tons of the toxic waste but had no provision for disposition of the waste within the State of Alabama. Subsequently, in the summer of 1988, the TWC and Chem-Waste entered the

contract for Chem-Waste to remove the toxic waste to the Alabama site. The parties also seem to agree that no notice of any of these facets were given in Alabama and no waste permit was issued to the Alabama facility until its waste permit became effective on July 11, 1988, and in a letter dated September 29, 1988, the EPA finally notified Alabama officials that Chem-Waste's Emelle facility had complied with the requirements of the EPA and was in compliance with its hazardous waste permit. The September 29, 1988, letter from the EPA to Alabama officials notified that the waste shipments would begin on or after October 7, 1988. No conciliation between Alabama, Texas and the EPA has taken place. Subsequently, the parties

agreed to delay commencement of shipment until October 21, 1988, in order to give the parties time to brief the Court and the Court time to consider the issues in the case.

An understanding of the history of hazardous waste is helpful in understanding the purpose and effect of the legislation in the field. As this country progressed from an agricultural to an industrial economy, Congress began to understand that the wages of progress sometimes involve death or great bodily harm--that some of the great benefits to the public are accompanied by great potential harm to individual members of the public. History has demonstrated that known and unknown hazards are sometimes associated with industrial progress and

that, occasionally, great stores of hazardous wastes are accumulated before anyone is aware of potential harm. Persons and States exposed to these dangers, in fairness and justice, must work together to eliminate or diminish insofar as possible such dangers. This working together can best be done with counsel and guidance from, and subject to the ultimate judgment of, experts in the field of these dangers--the hazardous wastes of progress. Congress recognized that the fear--indeed the potential panic--associated with the movements of stores of such hazardous waste would sometimes be outweighted by the diminution of the hazard by removal of the waste to isolated areas or areas better qualified to minimize the danger. The dangers and fears of

hazardous wastes, like the dangers and fears of war, must be shared by all but endured by those best able to survive the ordeal.

Perhaps the huge layer of chalk underlying the Emelle, Alabama, hazardous waste depository qualifies that area and the State of Alabama and its citizens as those best able to survive such an ordeal as the depositing of 47,000 tons of PCB may involve. On the other hand, perhaps, as Plaintiffs now allege, the hazards associated with said wastes can best be disposed of by burning in the State of Texas.

Alabama and its citizens, by this litigation, point out that there is a natural fear associated with any State's receiving such a large shipment

of what the experts--the EPA--have designated as hazardous waste and that, before the citizens of the receiving State should be so exposed, Congress intended and legislated that they be given an opportunity to conciliate with the donor State and the EPA for the purpose of minimizing a common peril. This Court firmly agrees.

Congress set up a scheme for conciliation with notice and a hearing for affected States:

> "The President shall consult with the affected State or States before determining any appropriate remedial actions to be taken pursuant to the authority granted under subsection (a) of this section." 42 U.S.C. §9604(c)(2).

The suggestion of the EPA that the recipient State of 47,000 tons of a hazardous waste is not an "affected" State is unacceptable to this Court.

If the waste is not hazardous, why has the EPA so classified it? Accepting the hazardous nature of the waste, to whom is it hazardous? Obviously, it must be hazardous to those nearest to it--the people of Texas while the waste is in Texas, the people of Alabama while in Alabama. Alabama is an affected State and, before the decision was made to dump on Alabama, Alabama was entitled to notice and an opportunity to be consulted. Congress so legislated.

This Court has "jurisdiction over all controversies arising under this chapter [Chapter 103 of 42 U.S.C.] without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. §9613(b). As pointed out by Defendants, exceptions

to jurisdiction are made in §9613(h), but the bar to jurisdiction applies to this suit under §9659 only if the removal of the waste occurs after an on-site remedy of the hazardous nature of the waste. §9613(h)(4).

> "(h) No federal court shall have jurisdiction (impertinent exceptions omitted) to review any challenges to removal or remedial action selected under section 9604 *** except one of the following: *** (4) An action under section 9659 *** alleging that the removal or remedial action *** was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site."

In 42 U.S.C. §9601(24), "remedial action" is defined as "actions consistent with permanent remedy taken instead of or in addition to removal actions *** to prevent or minimize the release or threatened release of hazardous substances so that they do

not migrate to cause substantial danger to *** public health or welfare or the environment." Here, no on-site remedial action is contemplated by Defendants. Indeed, the Plaintiffs in this case suggest this very remedy--the on-site burning of the hazardous waste. If the hazard had been destroyed on-site by fire, there would have been no cause for public notice to and a hearing for Alabama and its citizens. The owners of the Emelle depository, being thereby freed of responsibility for danger to the public, could have accepted the harmless waste as they saw fit. The exception to jurisdiction of this Court set out in §9613(h) does not apply under the pleadings in this case.

The Court of Appeals for the Eleventh Circuit in United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983), itemized the requirements for a temporary restraining order or a preliminary injunction as follows: (1) A likelihood that the plaintiff will prevail on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury if the preliminary relief is not granted; (3) the threatened injury to the plaintiff outweighs the threatened harm to the defendant; and (4) the granting of the injunction will not disserve the public interest.

This Court is of the opinion that the ROD issued in 1986 was substantially changed by the alteration of September 18, 1988. The amendment

allowed an additional 11,000 tons of toxic waste for a total of 47,000 tons of toxic waste to be brought to the State of Alabama without notice to the State or its citizens. Said change in the ROD was a substantial change thereof to be justified only after notice to Alabama and an opportunity to conciliate with Texas and the EPA. Because of the failure of the President or his designee to attempt to conciliate with Alabama, a State affected by the proposed removal, the EPA had no authorization to allow the removal in question. The Court, therefore, finds that there is a substantial likelihood that Plaintiffs will prevail on the merits of their claim; that, because of the nature of and the enormity of the proposed

removal into Alabama, there is a substantial threat that the Plaintiffs will suffer irreparable injury if the preliminary injunction is not granted; and that, because the EPA, with knowledge of the threat to the Texas citizens as early as 1986, did not propose a removal until October 7, 1988, this Court concludes that the EPA itself concluded that the dangers to Texas residents did not justify extreme haste in removal. This Court, therefore, knowing of the possibilities of accidents, leakage, etc., associated with removal, is convinced that the threatened injuries to the Plaintiffs outweigh the threatened injuries to the Defendants in maintaining the status quo. Also, for the same and additional reasons, the stay pending full

consideration of all issues in the matter will not disserve the public interest but will encourage the EPA to more cautiously follow its own rules in the future, all to the added safety of the public as a whole.

Finally, based upon the uncontroverted and undisputed evidence before this Court, the Court finds that no notice or opportunity to be heard was provided to the Plaintiffs prior to the issuance of the ROD for the Geneva Site, which deprived them of their constitutional rights of due process of law under the Fifth Amendment to the United States Constitution. Based upon such a deprivation, the Plaintiffs are threatened with irreparable harm for which there is no remedy but for the action of this Court.

Therefore, it is ORDERED by this Court that Defendants, the United States Environmental Protection Agency and its Administrator, Lee M. Thomas, their officers, employees and all persons acting by, through and for them [U.S. Government Defendants] be, and they are hereby, temporarily restrained from authorizing or engaging in (1) implementating the Geneva Site ROD and taking any remedial action pursuant thereto; (2) funding by federal government monies, either through use of the Superfund or otherwise, such remedial action; and (3) approving or otherwise facilitating the transportation of the Geneva Site contaminated soil from the State of Texas to the State of Alabama.

It is this Court's understanding, based upon representations made in open court by the Assistant Attorney General of the State of Texas, that the U.S. Government Defendants have already released to Intervenor State of Texas federal funds to be utilized for the implementation of the remedial action approved by the U.S. Government Defendants in their ROD for the Geneva Site. Accordingly, it is further

ORDERED by this Court that the U.S. Government Defendants take any and all actions necessary to abate and/or revoke such action and the utilization of such federal funds by the Intervenor State of Texas for the implementation of the remedial action for the Geneva Site. It is further

ORDERED by this Court that this Temporary Restraining Order is hereby granted pending a hearing, which is set for October 31, 1988, at 8:00 a.m., in Montgomery, Alabama, by agreement of all parties herein, on the posting vel non of security (and the amount thereof) for costs and damages as may be incurred or suffered by any one or more of the Defendants, including Intervenors Chem-Waste and the State of Texas, as a proximate result of any wrongful restraint or injunction. This Temporary Restraining Order shall expire on October 31, 1988, at 5:00 p.m., unless it is further extended by Order of the Court.

It is further ORDERED by this Court that the trial of this case is hereby scheduled for December 21, 1988, at

9:00 a.m., in Montgomery, Alabama.

DONE this 21st day of October, 1988.

R. E. Varner
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

STATE OF ALABAMA, Etc.; ET AL,	)	
Plaintiffs,	)	
VS.	)	
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ET AL,	)	CIVIL ACTION NO. 88V-987-N
Defendants,	)	
CHEMICAL WASTE MANAGEMENT, INC.; ET AL,	)	
Intervenors	)	

ORDER ON PRELIMINARY INJUNCTION

For the reasons set out in the Memorandum Opinion and Order entered by this Court on October 21, 1988, this Court is of the opinion that the findings therein are correct by a preponderance of the evidence and that

the Defendants and those in active concert or participation therewith should be preliminarily enjoined as prayed for in the original Complaint.

Therefore, it is ORDERED by this Court that Defendants, the United States Environmental Protection Agency [EPA] and its Administrator, Lee M. Thomas, their officers, agents, servants, employees and all persons in active concert or participation with them [U.S. Government Defendants] be, and they are hereby preliminarily enjoined from authorizing or engaging in (1) implementating the Geneva Site Record of Decision [ROD] and taking any remedial action pursuant thereto; (2) funding by federal government monies, either through use of the Superfund or otherwise, such remedial action; and

(3) approving or otherwise facilitating the transportation of the Geneva Site contaminated soil from the State of Texas to the State of Alabama. Nothing in this Order shall be construed to enjoin or restrain a shipment of waste from Texas to Indiana, which shipment was approved by the EPA in association with the plan for the Alabama shipment.

It is this Court's understanding, based upon representations made in open court by the Assistant Attorney General of the State of Texas, that the U.S. Government Defendants have already released to Intervenor State of Texas federal funds to be utilized for the implementation of the remedial action approved by the U.S. Government Defendants in their ROD for the Geneva Site. Accordingly, it is further

ORDERED by this Court that the U.S. Government Defendants take any and all actions necessary to abate and/or revoke such action and the utilization of such federal funds by the Intervenor State of Texas for the implementation of the remedial action for the Geneva Site. It is further

ORDERED by this Court that Plaintiffs post bond for security in this case in the amount of $564,970.00.

DONE this 31st day of October, 1988.

R. E. Varner
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

STATE OF ALABAMA, Etc.; ET AL,	)	
Plaintiffs,	)	
VS.	)	
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ET AL,	)	CIVIL ACTION NO. 88V-987-N
Defendants,	)	
CHEMICAL WASTE MANAGEMENT, INC.; ET AL,	)	
Intervenors.	)	

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is ORDERED, ADJUDGED and DECREED by this Court:

1. That Plaintiffs' Motion for Partial Summary Judgment filed herein

October 31, 1988, be, and the same is hereby, granted and Defendants, the United States Environmental Protection Agency and its Administrator, Lee M. Thomas, their officers, employees and all persons acting by, through and for them [U.S. Government Defendants], are hereby ORDERED to reopen the Record of Decision dated September 18, 1986, for the Geneva Industries Site and reconsider the remedial action to be taken at the Geneva Industries Site after statutory mandated notice and reconciliation with the State of Alabama.

2. That the Cross-Motion for Summary Judgment filed herein November 10, 1988, by Intervenor State of Texas be, and the same is hereby, denied. The Motion for Continuance contained in

said Cross-Motion for Summary Judgment is hereby denied as moot.

3. That the Motion for Summary Judgment filed herein November 10, 1988, by Intervenor Chemical Waste Management, Inc., be, and the same is hereby, denied.

4. That the Federal Defendants' Motion to Dismiss or, in the alternative, Motion for Partial Summary Judgment filed herein November 10, 1988, be, and the same is hereby, denied.

5. That the above-styled cause is hereby dismissed, and the Court hereby reserves ruling on the question of attorneys' fees, costs, etc.[1]

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[1]The primary issues in this case are pending on an interlocutory appeal in the United States Court of Appeals for the Eleventh Circuit. This final Order herein, except for the question of attorneys' fees and costs, is

DONE this 15th day of December, 1988.

R. E. Varner
United States District Judge

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[1] entered with the hope that the disposition by the Court of Appeals may give full guidance to the parties as to pertinent law. Thereafter, the question of attorneys' fees and costs may be fully determined.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

STATE OF ALABAMA, Etc.; ET AL,	)	
Plaintiffs,	)	
VS.	)	
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ET AL,	)	CIVIL ACTION NO. 88V-987-N
Defendants	)	
CHEMICAL WASTE MANAGEMENT, INC.; ET AL,	)	
Intervenors	)	

OPINION

This cause is submitted on Plaintiffs' Motion for Partial Summary Judgment filed herein October 31, 1988, and on all the materials filed in support of or in opposition to said motion.

This case involves the proposed shipment of 47,000 tons of contaminated soil from Geneva, Texas, to Emelle, Alabama. The pertinent facts of this case were extensively set out in this Court's Memorandum Opinion and Order dated October 21, 1988, and will not be restated here.

Plaintiffs move this Court for a partial summary judgment in their favor as to Counts One, Five, Eight and Nine of their Complaint, which ask this Court to grant a permanent injunction requiring the Defendants, the United States Environmental Protection Agency [EPA] and Lee M. Thomas, to (1) reopen the Record of Decision dated September 18, 1986, for the Geneva Industries Site and (2) allow Plaintiffs, after proper notice, an opportunity to be

heard and participate in the development of any remedial action at the Geneva Industries Site. Plaintiffs also request the Court to tax their costs, disbursements and attorneys' fees against Defendants.

Counts One, Five, Eight and Nine of Plaintiffs' Complaint all concern the issue of whether or not Defendant EPA provided the State of Alabama proper notice and an opportunity to be heard concerning the decision to send said contaminated soil to the Emelle facility. Plaintiffs' claims are based on the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [Act], regulations adopted pursuant thereto and the Fifth Amendment to the United States Constitution.

In opposition to Plaintiffs' Motion for Partial Summary Judgment, Defendants contend that the Complaint should be dismissed for lack of jurisdiction and improper venue as notice is not required under either the Act or the Constitution and, even if notice is required, there are material facts in dispute.[1]

In determining whether summary judgment is appropriate, the Court should decide whether the moving party has met his burden of showing that there is no genuine issue of material

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[1]The Court has previously ruled on Defendants' claims concerning jurisdiction, venue and whether notice was required in its Memorandum Opinion and Order dated October 21, 1988. Therefore, those claims will not be discussed further.

fact and that he is entitled to judgment as a matter of law. Washington v. Dugger, No. 87-3342, Slip Op. at 460 (11th Cir. Nov. 28, 1988). The moving parties, Plaintiffs, have shown to this Court by affidavits that Plaintiffs did not receive notice from the Defendants before a decision was made to send the contaminated soil to Alabama.

Defendants argue that Plaintiffs, in fact, had notice in the summer of 1988 and had an opportunity to discuss the decision to send said soil to Alabama with officials of the EPA, including Defendant Thomas, Administrator of the EPA. Copies of letters showing correspondence between the State of Alabama and the EPA are included as exhibits to Defendants'

opposition filed October 12, 1988, to Plaintiffs' motion for preliminary injunction. However, these letters are not proper evidence to be considered on motion for summary judgment and, therefore, were not taken into consideration.

While the Code sections pertinent to this case require a predetermination notice, the evidence properly submitted to the Court shows that the determination to ship the soil to Alabama was made prior to the State of Alabama's having received any notice of such a shipment. It is possible to waive notice in some instances. There is no competent evidence in this case to show whether Alabama officials did or did not waive any notice by corresponding and meeting with

officials from Washington this summer, but, clearly the State of Alabama did not originally waive notice of the original proceedings before the determination was made to send the soil to Alabama.

Therefore, Plaintiffs' Motion for Partial Summary Judgment will be granted.[2] Plaintiffs moved for summary judgment as to Counts One, Five, Eight and Nine of their Complaint. The other counts of the Complaint concern the question of whether alternative remedial methods

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[2]The Federal Defendants and both, Intervenors, Chemical Waste Management, Inc., and the State of Texas, filed motions for summary judgment or motions to dismiss with their responses to Plaintiffs' Motion for Partial Summary Judgment. These other motions for summary judgment and motions to dismiss will be denied.

would have been the proper method forthis contaminated soil. Those matters should be determined after conciliation with the State of Alabama by the EPA (President's appointee).

An Order will be entered in accordance with this Opinion.

DONE this 15th day of December, 1988.

R. E. Varner
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Nos. 88-7677 & 89-7024

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(U.S. Docket No. 88-V-987)

STATE OF ALABAMA, etc., et al.,

Plaintiffs-Appellees,
Cross-Appellants,

versus

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and
LEE M. THOMAS,

Defendants-Appellants,

STATE OF TEXAS; and
CHEMICAL WASTE MANAGEMENT, INC.,

Intervenors-Appellants,
Cross-Appellees.

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Appeals from the United States
District Court
for the Middle District of Alabama

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(April 18, 1989)

Before JOHNSON, HATCHETT and COX,
Circuit Judges.

JOHNSON, Circuit Judge:

This appeal arises from the issuance of a temporary injunction preventing the shipment of soil contaminated with PCBs and other toxic wastes from the Geneva Industries, Inc., toxic waste site in South Houston, Texas, to Chemical Waste Management (CWM)'s toxic waste treatment facility in Emelle, Alabama. The State of Alabama and its governor, attorney general, and head of the department of environmental management, acting in their capacities as private citizens, filed suit in federal district court seeking to enjoin shipment of these wastes. Plaintiffs asserted both constitutional claims and claims based on the Comprehensive Environmental Recovery, Compensation, and Liability Act, 42 U.S.C.A. §9601 et

seq. (CERCLA).

The district court issued a preliminary injunction halting EPA's participation in the remedial action selected to clean up the Geneva Industries site, and the EPA, along with intervenors State of Texas and CWM, appealed. During the pendency of the appeal, the district court granted partial summary judgment to plaintiffs enjoining the EPA from implementing its remedial action plan to clean up the Geneva Industries site until plaintiffs have had the opportunity to comment on the remedial action plan. This Court granted defendants' motion to consolidate the appeal from the preliminary injunction with the appeal from the grant of summary judgment. We reverse the grant of preliminary

injunction, reverse the grant of summary judgment, dissolve the permanent injunction, and dismiss this case for lack of subject matter jurisdiction.

I. FACTS

In 1983, Texas submitted the site of Geneva Industries, Inc.'s former petrochemical plant in South Houston, Texas, to be included on the National Priorities List for cleanup by the EPA pursuant to CERCLA. The site is contaminated with polychlorinated biphenyls (PCBs) and other toxic chemicals. The EPA placed this site on the National Priorities List, where it ranked number 37 out of over 700 sites listed. In 1983 and 1984, EPA

conducted a planned removal[1] to stabilize the site and to reduce the immediate health and safety risks of the contamination to residents in the area.

In 1984, the Texas Department of Water Resources, the state agency operating in cooperation with the EPA to clean up the site, contracted for a Remedial Investigation and Feasibility Study. This is a preliminary step in

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[1]A removal is a short-term action taken to neutralize the immediate health and safety risks created by toxic wastes. See 42 U.S.C.A. §9601(23). In contrast, remedial action, such as the action challenged in this case, "means those actions consistent with permanent remedy taken instead of or in addition to removal actions . . . . [T]he term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials." 42 U.S.C.A. §9601(24).

cleaning up a hazardous waste site under CERCLA. The contractor evaluated alternative remedial action plans and presented them to the state. In 1986, the Feasibility Study describing the alternatives was released for public comment and review. A public meeting was held in May 1986, and the public comment period was held open until June 10, 1986. On September 18, 1986, the Regional Director of the EPA issued the Record of Decision memorializing the alternative chosen to clean up the Geneva Industries site. The EPA selected offsite disposal of the hazardous wastes. At the time, there were only a limited number of treatment facilities in the United States capable of handling these toxic wastes. Among those facilities was CWM's hazardous

waste treatment facility in Emelle, Alabama.

There are two separate federal statutes regulating the Emelle, Alabama, facility. The Toxic Substances Control Act, 15 U.S.C.A. §2601 et seq. (TSCA), regulates the handling, storage, and disposal of wastes contaminated with PCBs. The Resource Conservation and Recovery Act, 42 U.S.C.A. §6901 et seq. (RCRA), regulates other hazardous wastes. CWM's Emelle, Alabama, facility is licensed under both federal statutes and under complementary state regulations[2] to handle the wastes

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[2]Alabama's Hazardous Wastes Management and Minimization Act, Ala. Code §22-30-1 et seq., governs CWM's Emelle facility. CWM cannot operate this facility without approval from the

located at the Geneva Industries toxic waste site. The TSCA and the RCRA ensure that CWM's toxic waste storage and treatment facility poses the least possible risk to human health and safety.

The TSCA establishes a regulatory framework for the safe handling and disposal of certain highly toxic wastes. Regulations adopted pursuant to the TSCA control the storage and disposal of PCBs. See 40 C.F.R.

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[2]State of Alabama. See generally Ala. Code §22-30-12(c) ("no person may commence or continue . . . operation of any hazardous waste treatment, storage or disposal facility without having applied for and obtained a permit. . .") Although CWM has not yet received a final operating permit, the State of Alabama authorized CWM to operate its Emelle facility under interim status. See Ala. Code §22-30-12(i).

§761.75(b)(8). The regulations establish very specific soil, hydrological, geological, and topographical requirements for facilities that dispose of wastes contaminated with PCBs. 40 C.F.R. §761.75(b)(1), (2), (3), (4), and (5). The regulations also provide for monitoring the groundwater in the vicinity of the chemical waste landfill. 40 C.F.R. §761.75(b)(6). The permit application process ensures that licensed treatment facilities comply with these requirements. 40 C.F.R. §761.75(c)(3).

The RCRA establishes a framework for regulating the storage and disposal of hazardous wastes in general. Operators of hazardous waste treatment, storage, and disposal facilities must

comply with detailed operating regulations, 42 U.S.C.A. §6924; see generally 40 C.F.R. Part 264. This includes stringent permit application requirements and regulations. See 42 U.S.C.A. §6925; see generally 40 C.F.R. Part 270. The regulations promulgated pursuant to the RCRA ensure that facilities disposing of hazardous wastes do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes. A permit is valid only for a maximum term of ten years, 40 C.F.R. §270.50(a), and each permit for a land disposal facility is reviewed after five years and is subject to modification at that point. 40 C.F.R. §270.50(d). A permit may be terminated for noncompliance with any

of its conditions, 40 C.F.R. §270.43(a)(1), for failure to disclose material information or misrepresentation of material facts, 40 C.F.R. § 270.43(a)(2), or if the activity "endangers human health or environment" and can be regulated only through modification or termination of the permit. 40 C.F.R. §270.43(a)(3).

CWM's Emelle, Alabama, hazardous waste treatment facility received permits under both the TSCA and the RCRA. This facility thus has complied with elaborate federal regulations designed to ensure the safe disposal of hazardous wastes, including wastes contaminated with PCBs. To the extent these federal regulations can and do provide for the safe treatment and disposal of toxic wastes, CWM's Emelle,

Alabama, facility poses no threat to the health and safety of the residents of Emelle or to other Alabama residents. This applies to the material shipped from South Houston, Texas, as well as to the material the facility has handled from Tennessee and from locations within the State of Alabama.

The State and citizens of Alabama participated throughout the process by which CWM received permits to handle hazardous wastes at its Emelle facility. At the time of the original application in May 1978, the State of Alabama strongly supported the grant of the permits. The facility began operating under interim status authorization in November 1980. See 42 U.S.C.A. §6935(e). In December 1984,

EPA, CWM, and the state entered into a Consent Agreement authorizing the facility to handle PCBs. In 1985, citizens of the State of Alabama received notice of the proposed licensing of the Emelle facility for disposal of PCBs under the TSCA. EPA provided twice the period for public comment normally accorded such decisions, held a public information session lasting 7-1/2 hours in Livingston, Alabama, and held an open public meeting. EPA received 78 oral and 145 written comments on the proposed permit, and responded in detail to each comment. The PCB disposal permit was challenged unsuccessfully in federal court under the Administrative Procedures Act. After responding in an acceptable

manner to all challenges, the final permit became effective July 11, 1988.

CWM received the contract to dispose of the Geneva Industries site wastes pursuant to a closed bidding contractor selection process. In January 1988, the Texas Water Commission, successor to the Texas Department of Water Resources, solicted sealed bids from contractors for the various projects called for in the Record of Decision. In response, CWM offered the lowest bid for disposal of the contaminated soil, and received the contract on April 8, 1988. The EPA did not select CWM's Emelle, Alabama, toxic waste facility in the Record of Decision for cleanup of the Geneva Industries site. In the Record of Decision, the EPA decided only that

offsite disposal was the best way to clean up the Geneva Industries site. The EPA made this decision in September 1986. The sealed bid solicitation process followed, and EPA granted CWM the contract to dispose of the wastes in April 1988.

In June 1988, Alabama legislators, including Governor Hunt and Attorney General Siegelman, learned of the proposed shipment of toxic wastes from Texas to Alabama. On June 22, 1988, Governor Hunt wrote to the Administrator of the EPA requesting a delay in the shipment. On June 23, 1988, Attorney General Siegelman wrote to the Administrator requesting information about the nature of the Geneva Industries site toxic wastes. The EPA delayed the shipment to respond

to the letters in detail. EPA officials also met with Alabama Congressmen and state legislators to address their concerns. After considering the concerns expressed by the State of Alabama, the EPA decided to follow the original remedial action plan set out in the Record of Decision.

Shortly thereafter, the State of Alabama and three individual citizens of Alabama, Governor Hunt, State Attorney General Siegelman, and Leigh Pegues, head of the state department of environmental management, filed suit against the EPA seeking to enjoin shipment of the hazardous wastes from Texas to Alabama. The district court granted a preliminary injunction enjoining the EPA and its administrator and employees from executing the Geneva

Industries site remedial action plan, from funding the remedial action, or from approving or otherwise facilitating the transportation of hazardous wastes from Texas to Alabama. CWM and the State of Texas intervened, and, along with the EPA, appeal the grant of this preliminary injunction. Prior to our consideration of this appeal, the district court granted partial summary judgment to the plaintiffs, ordered EPA to reopen its Record of Decision for the Geneva Industries site, and dismissed the remainder of the case. Defendants appealed. We consolidated the appeals and address both in this decision.

II. DISCUSSION

The district court had jurisdiction to grant summary judgment and to

dismiss the suit despite the pending interlocutory appeal. Cf. United States v. White, 846 F.2d 678, 693 n.23 (11th Cir. 1988). However, that decision did not divest this Court of its jurisdiction over the interlocutory appeal of the preliminary injunction. See generally Griggs v. Provident Consumer Discount Co, 459 U.S. 56 (1982)(per curiam). Although the injunction itself did not survive the grant of summary judgment and dismissal, Cypress Barn, Inc. v. Western Electric, 812 F.2d 1363 (11th Cir. 1987), we still have jurisdiction over this appeal. Cf. University of Texas v. Camenisch, 451 U.S. 390 (1981) (fact that preliminary injunction itself is moot does not moot appeal from grant of preliminary injunction).

In addition, although no final judgment has been entered pursuant to Fed. R. Civ. P. 54(b), we have jurisdiction over the appeal from the grant of summary judgment because the district court granted a mandatory permanent injunction compelling EPA to reopen its Record of Decision. See 28 U.S.C.A. §1291.

Plaintiffs challenge the EPA's failure to provide them with notice and a hearing before choosing the appropriate remedial action for the Geneva Industries toxic waste site in South Houston, Texas. These claims have two bases, the first constitutional and the second statutory. Plaintiffs argue that the EPA could not implement this remedial action plan without providing them with

notice and an opportunity for a hearing without violating the due process clause of the fifth amendment. The State of Alabama argues it is an "affected state" within the meaning of 42 U.S.C.A. §9604(c)(2), and thus was entitled to notice and an opportunity to participate in the choice of offsite disposal as the appropriate remedial action for the Geneva Industries toxic waste site. The individual plaintiffs assert they were entitled to notice and an opportunity to participate pursuant to 42 U.S.C.A. §9613(k)(2)(B). Finally, all plaintiffs argue EPA failed to comply with the publication requirements of 42 U.S.C.A. §9617. Plaintiffs base jurisdiction on four separate provisions: 28 U.S.C.A. §1331, which gives federal courts

jurisdiction over claims arising under the Constitution; 42 U.S.C.A. §9613(b), which gives federal courts jurisdiction over challenges to actions taken pursuant to CERCLA; 42 U.S.C.A. §9659(a), which gives persons authority to challenge remedial actions selected under CERCLA; and 5 U.S.C.A. §702, which gives federal courts jurisdiction over challenges to administrative agency actions. We address each of these claims in turn.

A. Constitutional Claims

Plaintiffs assert that the denial of notice and opportunity for a hearing before implementation of the remedial action plan violates their due process rights under the fifth amendment. Standing is a jurisdictional prerequisite to suit in federal court.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475-76 (1982). The State of Alabama is not included among the entities protected by the due process clause of the fifth amendment, South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966), and lacks standing to claim that the EPA was constitutionally compelled to provide it with notice and an opportunity to be heard. See generally Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 218-19 (1974) (plaintiff must assert legally cognizable injury in fact, whether real or threatened, before federal courts have jurisdiction). The individual plaintiffs also fail to satisfy the standing requirements necessary for the

exercise of federal jurisdiction over their constitutional claims.

Standing involves two aspects. The first is the minimum "case or controversy" requirement of Article III. That requirement mandates that the plaintiff himself or herself suffer actual or threatened injury, resulting from the action challenged, that is likely to be redressable in a judicial action. Warth v. Seldin, 422 U.S. 490, 499 (1975). In addition, the Supreme Court has established several requirements based on prudential considerations. A litigant generally may not assert the rights of another person, Allen v. Wright, 468 U.S. 737, 751 (1984), or present generalized grievances about the conduct of government which are more appropriately

addressed in the representative branches, United States v. Richardson, 418 U.S. 166, 174-75 (1974), and the litigant's complaint must fall within the "zone of interests" protected by the law invoked. Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 153 (1970).

Plaintiffs allege two types of real or threatened injury caused by defendants' actions.[3] First, plaintiffs argue that shipment of these

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[3]To the extent plaintiffs also seem to assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the commerce clause bars such a distinction. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). Although Congress may override the commerce clause by express statutory language, South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984), it has not done so in enacting CERCLA.

toxic wastes will cause increased expenditures of tax revenues through increased costs of highway maintenance and environmental safety measures. Plaintiffs base standing on their status as taxpayers. This does not satisfy the minimum constitutional requirement of injury in fact necessary for the exercise of federal jurisdiction. See generally Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (plaintiff must allege "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"). Although an injury need only be "trifling," it must nevertheless be a real or threatened injury suffered by one of the plaintiffs. See Schlesinger, 418 U.S.

at 220-21 ("Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution."). In certain limited circumstances, where an expenditure itself would violate an express constitutional provision, a taxpayer may have standing to challenge the expenditure. See Flast v. Cohen, 392 U.S. 83 (1968) (taxpayer could challenge expenditure that violated establishment clause). Otherwise, however, plaintiffs as taxpayers do not have standing to challenge governmental action. See, e.g., Valley Forge, 454 U.S. at 476-82 (taxpayers lacked standing to challenge government transfer of property to religious

organization on establishment clause grounds); Schlesinger, 418 U.S. at 222 (citizens as taxpayers have no standing to compel governmental compliance with federal statute). In this case, plaintiffs do not allege that the increased expenditure of state funds, if it occurs, would violate any constitutional provision. Thus, plaintiffs lack standing to challenge this action based on their status as taxpayers alone.

Second, plaintiffs allege injury based on the threat to the environmental quality of the State of Alabama. This claim alleges the requisite injury in fact for the federal court to exercise subject matter jurisdiction. See generally Japan Whaling Ass'n v. American

Cetacean Society, 478 U.S. 221 (1986) (whale watching group has standing to challenge failure of Secretary of Commerce to cite Japan for overharvesting whales); United States v. SCRAP, 412 U.S. 669 (1973) (potential adverse environmental impact of railroad rate change sufficient); cf. Callaway v. Block, 763 F.2d 1283 (11th Cir. 1985) (peanut farmers had standing to appeal denial of injunction against Secretary of Agriculture preventing implementation of new regulations). There must also be a connection between the injury alleged and the challenged action, however. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976) (injury must be able to be traced to the challenged action). Generalized

grievances about the conduct of government are insufficient. See United States v. Richardson, 418 U.S. 166, 175 (1974). The injury must be a consequence of the challenged action. See Valley Forge, 454 U.S. at 473 ("The exercise of judicial power . . . is therefore restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate.") (emphasis added).

In this case, there is no necessary casual connection between the injury to Alabama's environment and the lack of notice and opportunity to participate in the selection of the remedial action for the Geneva Industries site. Plaintiffs do not challenge the shipment of wastes from Texas to

Alabama directly. To the extent the injury alleged may result from the operation of CWM's Emelle, Alabama, facility, plaintiffs do not challenge the permits that allow CWM to receive PCBs.[4] Rather, plaintiffs seek only a hearing in which to express their views about the appropriate remedial action for this site. The threat to Alabama's environment, however, results solely from the actual shipment and receipt of the wastes. Plaintiffs' injury thus does not result from their lack of participation in the development of the Record of Decision. Plaintiffs' injury also is not likely

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[4]This includes an agreement the State of Alabama entered into with CWM in December 1984 specifically authorizing the Emelle facility to receive PCBs.

to be redressed by a reopening of the Record of Decision. Because they have failed to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief", Allen v. Wright, 468 U.S. at 751, the individual plaintiffs lack standing to challenge this shipment under the fifth amendment.

Plaintiffs argue that this is their only chance to challenge this decision. Even assuming this assertion is true, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." Schlesinger, 418 U.S. at 227. Plaintiffs simply are not entitled to raise these constitutional claims. Consequently,

the constitutional claims raised by the plaintiffs must be dismissed for lack of standing.

B. Statutory Claims

Alabama argues that it is an "affected state" within the meaning of 42 U.S.C.A. §9604(c)(2), and that it was entitled to receive notice and an opportunity for a hearing before final selection of the remedial action plan.[5] The individual plaintiffs assert that they were entitled to notice and an opportunity to comment on the remedial action plan prior to implementation under 42 U.S.C.A.

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[5]That section provides: "The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section."

§9613(k)(2)(B). Plaintiffs also assert EPA failed to publish the Record of Decision according to the requirements of 42 U.S.C.A. §9617. Plaintiffs assert they have the authority to bring this action to compel compliance with the provisions of CERCLA under section 310(a), 42 U.S.C.A. §9659(a). That section allows any person to commence a civil action against the EPA to compel compliance with CERCLA's provisions. See 42 U.S.C.A. §9659(a)(2). "Person" includes the State of Alabama. 42 U.S.C.A. §9601(21).

Plaintiffs base federal jurisdiction over their statutory claims on two provisions. First, plaintiffs assert that the 1986 amendments to CERCLA grant federal courts jurisdiction over this action.

Plaintiffs rely on section 113(b), 42 U.S.C.A. §9613(b), which grants federal courts exclusive original jurisdiction over controversies arising under CERCLA, and section 310(a), 42 U.S.C.A. §9659(a), the general citizen suit enforcement provision. Second, plaintiffs base federal jurisdiction on the Administrative Procedures Act, 5 U.S.C.A. §701 et seq. (APA). The APA provides, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C.A. §702. We review jurisdiction under CERCLA and under the APA separately.

1. CERCLA

Plaintiffs argue that the district court has jurisdiction over these claims under section 113(b) of CERCLA, 42 U.S.C.A. §9613(b). Section 113(b) provides: "Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy." Defendants argue that section 113(h), 42 U.S.C.A. §9613(h), removes these challenges from federal jurisdiction.[6]

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[6](h)Timing of review
No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which

Defendants argue that section 113(b) grants jurisdiction to the federal courts over controversies arising under CERCLA; that section 113(h) removes from federal jurisdiction challenges to remedial actions selected under section 104, 42 U.S.C.A. §9604; and that

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[6] is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action [sic] selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

section 113(h)(4) then restores federal jurisdiction over suits brought under section 310 once the remedial actions are taken under section 104 or secured under section 106. Defendants argue that under section 113(h)(4), no action may be brought under section 310(a) until the remedial action is actually taken.[7] We agree.

Section 113(h) clearly removes this challenge from federal jurisdiction, providing: "No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action [sic] selected" except as section 113(h)(1)-(4) provides.

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[7]Section 310 is qualified by the phrase "Except as provided in . . . section 9613(h) of this title (relating to timing of judicial review) . . . ."

Section 113(h)(4) in general addresses the timing of judicial review of EPA cleanup efforts. The plain language of the statute indicates that section 113(h)(4) applies only after a remedial action is actually completed. The section refers in the past tense to remedial actions taken under section 104 or secured under 106. Absent clear legislative intent to the contrary, this language is conclusive. See Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The legislative history behind this section supports rather than clearly contradicts this conclusion. Judicial review is to be delayed until "all the activities set forth in the Record of Decision for the surface cleanup phase

have been completed." H. Conf. Rep. No. 962, 99th Cong., 2d Sess. 224, reprinted in 1986 U.S. Code Cong. & Admin. News 3317. See, e.g., H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 81, reprinted in 1986 U.S. Code Cong. & Admin. News 2863 ("The section [113] is intended to codify the current position of the Administrator and the Department of Justice with respect to preenforcement review: there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action [sic] have been completed . . . ."); H.R. Rep. No. 253(II), 99th Cong., 2d Sess. 22, reprinted in 1986 U.S. Code Cong. & Admin. News 3045 ("Therefore, the Judiciary Committee amendment reaffirms

that, in the absence of a government enforcement action, judicial review of the selection of a response action should generally be postponed until after the response action is taken.").

This court has already recognized that "the primary purpose of CERCLA is the prompt cleanup of hazardous waste sites." Dickerson v. Administrator, EPA, 834 F.2d 974, 978 (11th Cir. 1987) (quoting J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 264 (6th Cir. 1985)). Prior to the 1986 amendments that enacted section 113(h), courts uniformly held that challenges to a Record of Decision were barred before full implementation. See, e.g., Wagner Seed Co. v. Daggett, 800 F.2d 310, 314-15 (2d Cir. 1986); Lone Pine Steering Committee v. EPA, 777 F.2d

882, 886-87 (3rd Cir. 1985), cert denied, 476 U.S. 1115 (1986). Most of the courts that have addressed this issue after the 1986 amendments have reached the same conclusion. See, e.g., Frey v. Thomas, slip op. 88-948-c (S.D. Ind. December 6, 1988) ("In light of this legislative history, the Court finds that 42 U.S.C.A. §9613(h)(4) permits citizens' suits challenging EPA actions only once a remedial action or discrete phase of a remedial action has been completed."); Chemical Waste Management, Inc. v. EPA, 673 F. Supp. 1043, 1055 (D. Kan. 1987) ("the legislative history of section 113(h) establishes that it was designed to preclude piecemeal review and excessive delay of cleanup"); cf. Dickerson, 834 F.2d at 977 ("42 U.S.C.A. §9613(h)

clearly provides that federal courts do not have subject matter jurisdiction for preenforcement review of EPA removal actions pursuant to section 9604."); but see Cabot Corp. v. EPA, 677 F. Supp. 823 (E.D. Pa. 1988) (allowing preimplementation review under section 9613(h)(4). Because this challenge does not fit within section 113(h)(4), we lack jurisdiction over this challenge to the implementation of the remedial action plan under section 113(h). Plaintiffs argue that the action that caused the injury was the decision to employ an offsite remedial scheme and to solicit bids for the disposal of the toxic waste. Plaintiffs argue that this decision has already been taken, and that therefore they fit within section 113(h)(4)'s exception to

section 113(h). This argument fails, however, because plaintiffs challenge the implementation of the remedial action plan selected, not the selection of an offsite remedial action plan in general.

The district court found that section 113 does not remove this case from federal jurisdiction because of the last sentence of section 113(h)(4), which provides: "Such an action [under section 310] may not be brought with regard to a removal where a remedial action is to be taken at the site." This sentence has no bearing on whether section 113(h) applies in this case, however. Plaintiffs challenge not a removal but a remedial action. EPA has already conducted an onsite removal action. The district court seems to

read "removal" as "transportation". Compare 42 U.S.C.A. §9601(23) (removal "means the cleanup or removal of released hazardous substances from the environment") with 42 U.S.C.A. §9601(26) (defining transportation). The district court also seems to read the last sentence of section 113(h)(4) to require neutralization of the hazardous wastes prior to implementation of any offsite remedial action. That is simply incorrect.

The district court also found that a September 18, 1988, amendment to CWM's disposal contract constituted a substantial alteration of the original Record of Decision, and that that alteration required notice to the State of Alabama and an opportunity for "reconciliation" among the States of

Alabama and Texas and the EPA. The district court apparently relied on section 117(c), 42 U.S.C.A. §9617(c), which provides: "After adoption of a final remedial action plan . . . if [a subsequent remedial action] differs in any significant respects from the final plan, the President or the State shall publish an explanation of the significant differances and the reasons such changes were made." In this case, EPA and CWM increased the amount of hazardous wastes to be shipped from 36,000 tons to 47,000 tons. The plan itself remained offsite treatment and disposal. This alteration does not cause the remedial action to differ significantly from the original plan within the meaning of section 117(c). Even if this change were deemed

significant within the meaning of section 117(c), however, the only consequence would be publication of the significant differences and the reasons for the changes in a major local newspaper. See 42 U.S.C.A. §9617(d). Section 117 does not authorize private parties to halt implementation of a remedial action plan. We hold that the district court lacked jurisdiction over this action to the extent plaintiffs challenge EPA's remedial action plan.

Plaintiffs argue that this is not a challenge to the remedial action plan selected for the Geneva Industries site, and that therefore section 113(h) does not apply. Plaintiffs' complaint belies this assertion. In paragraph B of their prayer for relief, for example, plaintiffs requested a

preliminary injunction enjoining the EPA from participating in the shipment of these wastes from Texas to Alabama and in any further remedial action to be taken in connection with the Geneva Industries site. In paragraph C, plaintiffs requested a permanent injunction along the same lines. In paragraph D, plaintiffs requested the district court to reverse the EPA's selection of this remedial action plan on numerous substantive grounds. In paragraph E, plaintiffs requested a mandatory injunction compelling EPA to reopen its Record of Decision.

To the extent plaintiffs' complaint may in part be read as not challenging the remedial action plan and therefore not removed from federal jurisdiction by section 113(h), we address the

merits of plaintiffs' claims briefly. The district court held that under CERCLA, plaintiffs were entitled to notice and an opportunity to participate in the development of the Record of Decision issued regarding the Geneva Industries site. The State of Alabama argues it is an affected state within the meaning of section 104(c)(2), and therefore was entitled to notice and an opportunity to participate in the public hearings regarding the appropriate remedial action for the cleanup. The Record of Decision was issued September 18, 1986. Alabama only arguably became "affected" within the meaning of section 104 in April 1988, when CWM received the contract to dispose of these hazardous wastes at its Emelle,

Alabama, facility. See 42 U.S.C.A. §9604(c)(1) (addressing "the State or States in which the source of the release is located "). Alabama thus was not an affected state within the meaning of section 104(c)(2) at the time the EPA issued its Record of Decision. Similarly, the individual citizens of Alabama were not "interested persons" or "affected persons" within the meaning of section 113(k)(2)(B) at the time EPA issued its Record of Decision. They too only became affected or interested within the meaning of section 113(k) in April 1988.[8] To the extent plaintiffs

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[8]Naturally, both the State of Alabama and the citizens of Alabama were entitled to notice and an opportunity to participate in the decision to license CWM's Emelle, Alabama, hazardous waste treatment

challenge the EPA's cleanup under section 117(a) and (b), it is clear that EPA has complied fully with the publication and comment requirements. Consequently, we reverse the district court's grant of summary judgment and dissolve the injunction compelling the EPA to reopen its Record of Decision for thre Geneva Industries site.

2. Administrative Procedures Act

Plaintiffs argue that the district court had jurisdiction over this claim under the APA. Plaintiffs assert two separate claims under the APA. First, plaintiffs seek to compel the EPA to hold a hearing in which they can express their concerns about the

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*facility. Both received ample notice, and EPA responded to substantial public commentary during the licensing application stage.

shipment of the toxic wastes from Texas to Alabama. See 5 U.S.C.A. §706(1). Second, plaintiffs seek to have the EPA's efforts to implement the remedial action plan declared unlawful. See 5 U.S.C.A. §706(2). The APA creates a presumption that individuals can bring suit to challenge agency actions that cause legally cognizable injury. 5 U.S.C.A. §702. See generally Clarke v. Securities Industries Assn., 479 U.S. 388, 399 (1987). If Congress expressly foreclosed or postponed judicial review of these agency actions, however, then that presumption is rebutted. See 5 U.S.C.A. §701(a)(1). Congressional preclusion to judicial review is in effect a jurisdictional bar to suit. Block v. Community Nutrition Institute, 467 U.S. 340, 353 n.4 (1984). "Whether

and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Id. at 345. We have already concluded that Congress intended to remove challenges to remedial action plans from the jurisdiction of the federal courts until the remedial action has been taken. The district court thus lacked subject matter jurisdiction over the claims brought under the APA.

III. CONCLUSION

We hold that plaintiffs lack standing to challenge under the fifth amendment EPA's failure to provide them with notice and an opportunity to

participate in developing the Record of Decision in which EPA selected offsite disposal as the appropriate remedial action for the General [sic] Industries toxic waste site in South Houston, Texas. We also hold that because plaintiffs challenge a remedial action plan selected under section 104 of CERCLA, section 113(h) removes this suit from federal jurisdiction provided in section 113(b). Section 113(h)(4) does not restore federal jurisdiction until the remedial action is taken. As the legislative history indicates, Congress enacted this delay in judicial review to ensure prompt and effective permanent cleanup of hazardous waste sites that threaten human health and safety. Because that intent is clear, the APA does not provide a basis for

the exercise of federal jurisdiction. Consequently, we hold the district court lacked subject matter jurisdiction over the challenge to the remedial action plan. To the extent plaintiffs' complaint may be read as not challenging the remedial action, the district court erred in granting summary judgment to plaintiffs and ordering the EPA to reopen its Record of Decision.

The grant of preliminary injunction is REVERSED, the grant of summary judgment is REVERSED, the permanent injunction is DISSOLVED, and the case is DISMISSED for lack of subject matter jurisdiction. The challenge to the bond requirement imposed in connection with the grant of the preliminary injunction is DISMISSED as moot. We do

not address defendants' argument that venue was improper in the Middle District of Alabama under section 113(b).